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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL SIONE GREEN, Defendant and Appellant.	A151810 (City & County of San Francisco Super. Ct. No. SCN224590)

Defendant Michael Sione Green appeals a judgment entered upon a jury verdict finding him guilty of first degree murder, attempted murder, and related crimes. He contends there is insufficient evidence that the murder and attempted murder were of the first degree, that the trial court erred in failing to instruct the jury on the lesser included offenses of voluntary manslaughter and attempted voluntary manslaughter, and that his counsel was ineffective in failing to request an instruction on provocation and a limiting instruction. Although we shall remand the matter to allow the trial court to consider whether to strike firearm enhancements, we otherwise affirm the judgment.

I. BACKGROUND

In the early morning hours of November 17, 2013, a group of female friends emerged from one nightclub in San Francisco and a second group of people left another nightclub nearby. Members of both groups went to a parking lot to retrieve their cars. After a minor car accident and an ensuing argument, defendant shot two members of the group of female friends, killing one and injuring the other. Multiple people testified

about these events, with some discrepancies in their version of events and in their descriptions of the shooter.

A. Testimony of the Victims' Friends

The victims of the crimes, Melquisha Warren and Danisha B.,[1] were at the OMG nightclub in San Francisco with a group of female friends, all in their mid-20's, the evening of November 16, 2013. They stayed until around 1:00 or 2:00 in the morning. Danisha did not drink alcohol or use any drugs that night.

Danisha testified that she and Warren left and went to Danisha's car in an alleyway, then drove into a parking lot to pick up another member of their group. When they went into the parking lot with the car's headlights on, Danisha saw a Tongan or Samoan man about three feet in front of her, walking toward the car and looking angry, and she backed up slowly. As she did so, she sideswiped a parked car. She stopped, and a woman who appeared to be Tongan or Samoan approached, cursed at her, and opened the car door. Danisha told the woman to calm down and said she would cover the damage to the car. A man who seemed to be the same person who had walked toward the car hit Danisha in the jaw.

Warren got out of the car to calm the situation, and a Tongan or Samoan man, with facial hair and dreadlocks, came up and pointed a gun at Danisha. He turned the gun on Warren and shot her dead, then pointed it at Danisha again as she sat seat-belted in the car and shot her multiple times, hitting her hip, thigh, buttocks, rib cage, and the side of her breast.

Several other friends of Warren and Danisha were present in the parking lot. Marshella R. testified that she was waiting in the parking lot for Danisha and Warren to pick up Tiffany C., who was Warren's girlfriend. Danisha drove into the lot with Warren, and Marshella saw Danisha's car back up and collide with a black Chrysler 300. A woman got out of the car that had been hit and came up to the driver's side window of

[1] We will refer to some of the witnesses by their first names in the interest of privacy. We intend no disrespect.

Danisha's car. Warren got out and went to the back of the car, where a group of more than five people was standing. The group pushed Warren back, and she was shot twice. Marshella ran toward Warren, heard more shots, and saw Danisha being shot. The shooter was a tall Tongan or Samoan man with long dreadlocks tied into a ponytail, wearing a black long-sleeved shirt with a white shirt under it, jeans, and a chain. She did not recall whether he had a tattoo. Marshella thought the shooter had emerged from the driver's seat of the black Chrysler. After the shooting, the shooter got back into the Chrysler and drove away with a car full of people.

Franchesca J., another member of the group of friends, testified that she was in the parking lot with Marshella. She heard the car accident and saw Danisha's car, its bumper hanging off, backing away from another vehicle. A woman opened Danisha's car door, there was some yelling, and Warren got out of the car and walked toward the rear. The woman who had opened the car door pushed Warren, and Franchesca and a friend named Nicki ran to the vehicle where the people were arguing. A man walked toward the back of the car. A girl handed him a handbag, and he pulled out a gun, cocked it, and asked the group of friends if they had a problem. They put their hands up, and Franchesca said, "No. We just came out here to have a good time. It's not that serious. Danisha has insurance." He pointed the gun at Franchesca, Nicki, and Warren, then at Danisha. Warren said, "Wait," and he shot her twice, then turned the gun on Danisha and continued to shoot. He then got into a white car and drove out of the parking lot.

Another member of the group, Celeste T., testified that after the collision, Warren got out of the car, holding her hands up, in an apparent effort to defuse the situation. The people who had been in the car that was struck argued with Danisha about who was at fault, and a group of people, including friends of Warren and Danisha, gathered by the cars and spoke with each other about what they had seen. The shooter went to the black

Chrysler and got a gun. After the shooting, two vehicles left the lot at full speed, one a large black vehicle and another that might have been white.[2]

B. Testimony of Others at Scene

Funaki M. was at the Club Mezzanine the evening of the shootings. Defendant was also at the club, and Funaki saw him stop a fight during the evening. Funaki left the club at about 2:00 in the morning and walked to the parking lot. She saw defendant there, and they discussed plans to continue socializing with their friends.

As they spoke in the middle of the parking lot, "all of a sudden" a car pulled into the parking lot and stopped two and a half or three feet in front of them as if they were in the way. The car revved its engine and flashed its lights. Funaki and defendant were annoyed, and Funaki thought there were men in the car who "wanted a problem." Funaki made a motion for the car to go around them, defendant started walking toward the car, Funaki told defendant to "leave it alone," and the car began backing up. Funaki heard a scraping noise, and defendant walked more quickly toward the car, looking ready to fight. A lot of people ran from the parking lot entrance and from other parked cars and gathered around the car, and Funaki heard female voices cursing and saw a girl yelling on the other side of the car. Funaki then heard 11 or 12 gunshots, but did not see who fired them.

Haunani T. had been at the Club Mezzanine that evening and saw the shooting. She told a police officer in an anonymous call that she knew defendant and she was "100 percent sure" he was the shooter. She described him as having hair in long dreadlocks, a dark shiny sweater, a chain around his neck, and a medallion that said "ES." The description of the chain was consistent with images of defendant in a surveillance video at the Club Mezzanine. At trial, Haunani testified she did not know defendant and did

[2] A security guard also testified two vehicles left at the same time, one black and one white.

not recall what the shooter was wearing; she testified she did not recall recognizing defendant or describing him to the police.

Manufou U. was at the Club Mezzanine, and went to the parking lot afterward. After the shooting, she identified a picture of defendant as the shooter, and said the victim who got out of the car had her hands up in the air the whole time and did not want trouble. At trial, however, she testified that she was intoxicated that evening and everything was a "blur," and she did not recall whether she heard gunfire and did not remember whether she saw the shooter.

C. Identification of Defendant on Surveillance Video

Police officers showed some of the witnesses a surveillance video taken that evening at Club Mezzanine. Marshella identified an image of defendant in a videotape as the shooter with "100 percent" certainty, and she recognized him at trial, although his appearance had changed.

Danisha described the shooter as six feet seven or eight inches tall, wearing either a striped or checkered shirt with multiple dark colors like red and blue, with a white T-shirt underneath it. She was hospitalized for more than a month. While she was in the hospital, police inspectors interviewed her, and she identified an image of defendant on the surveillance video as the person who shot her. She said he was wearing different clothes than the shooter was wearing, but she recognized his face and a chain that he wore.

Another member of the group of female friends, Danielle R., described the shooter as close to six feet tall, of Pacific Islander descent, wearing a black top and a long ponytail. She identified the shooter in a video she was shown by the police.

Franchesca described the shooter as wearing a long-sleeved black shirt, having facial hair, and wearing long hair in a ponytail. When she viewed the surveillance video, she recognized the shooter on the video.

Tiffany described the shooter as tall, wearing a black hoodie-like sweater or T-shirt, with a beard, hair either pushed back or cut short, and bushy eyebrows. Tiffany fainted when she learned that Warren had died, and she was taken to the hospital. When

she met with police officers a few days later, she identified the shooter in the surveillance video.

Celeste testified the killer was a larger male, apparently Pacific Islander, with a black hoodie and a lot of hair. She saw someone on the surveillance video who looked like the shooter.

A security guard at the Club Mezzanine, who had seen the shooter earlier in the evening, told police the person in the surveillance video was the shooter, and he confirmed this statement in his testimony to the grand jury. At trial, he testified he only meant that the person in the video looked like the shooter. The security guard testified the shooter was Tongan, he was wearing a black leather coat, and his hair was tied up.

D. Investigation

Warren died of a gunshot wound to her head, which travelled through her right nostril and into her brain. A toxicology report showed no alcohol or other substances in her system. Danisha suffered gunshot wounds to her chest, abdomen, right hip, and right thigh. She was hospitalized for more than a month and underwent two surgeries. Her blood alcohol level was less than .01 percent, the lowest traceable amount.

Defendant was found in Florida six months later, living under a different name. His hair was shorter than it was at the time of the shootings, his facial hair was different, and he had lost weight. He looked very different than he did in the surveillance video.

E. Defense Case

The theory of the defense was mistaken identity. Defendant's father, who was at the Club Mezzanine that night attending a Polynesian concert, testified that defendant was wearing all blue, including a light blue shirt. Defendant had a tattoo of his mother's name on the left side of his neck. According to defendant's father, defendant's appearance at trial was the same as it was at the time of the shootings.

Liadonna T., one of the group of the victims' friends, was in the parking lot at the time of the shootings, heading for Danisha and Warren's car. She heard shots, and saw a man near the car with a gun. She told a police officer that evening that she thought the shots came from a black Chrysler 300, but at trial she testified that she did not see the

shooter getting out of the car. She had been shown a video, but did not recognize anyone as the shooter.

A parking lot attendant who saw the incident testified that the shooter was an "African guy" with dark skin, wearing a blue polo shirt with a collar and denim jeans, about five feet five inches tall and 140 or 150 pounds, with short hair.

A police officer testified that when he went to the scene shortly after the shooting, he asked who the shooter was, and someone pointed toward a group of Pacific Islanders, who were arguing with each other. The members of the group did not comply immediately with the officer's commands to put their hands up. One man had shoulder-length hair tied back in a ponytail, was dressed casually, and appeared to be between 20 and 30 years old. The members of the group were eventually allowed to leave the parking lot.

Dr. Scott Fraser testified as an expert witness on neurophysiology and eyewitness memory. He testified as to various factors that affect the accuracy of an eyewitness identification, including the distance between the witness and the suspect, the lighting, stress, the presence of a gun, differences in race,[3] speaking with other witnesses, and repeated exposure to a picture of the suspect. Witnesses who saw a person well enough to recognize him later would recall distinctive features like scars, tattoos, eyeglasses, facial hair, unusual hair styles, or distinctive clothing.[4] A witness's memory becomes less accurate over time, with the greatest percentage of details lost occurring within four to six hours. Showing a witness a video clip with only one person dressed as the witness described would not lead to a reliable identification.

F. Verdict and Sentencing

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[3] With one exception, the members of the group of female friends were African-American. Defendant is of Tongan ancestry.

[4] None of the witnesses mentioned the shooter had a tattoo on his neck, as defendant did.

The jury found defendant guilty of first degree murder (Pen. Code, § 187, subd. (a); count 1),[5] attempted murder (§§ 187, subd. (a) & 664; count 2), firing at an occupied vehicle (§ 246; count 3), assault with a semi-automatic firearm (§ 245, subd. (b); counts 4 & 5), assault with a firearm (§ 245, subd. (a)(2); counts 6 & 7), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 8), and carrying a loaded firearm (§ 25850, subd. (a); count 10), and found true firearm and great bodily injury enhancements.

On count 1, first degree murder, the trial court sentenced defendant to 25 years to life for first degree murder, with an additional mandatory term of 25 years to life for a firearm enhancement (§ 12022.53. subd. (d)). On count 2, attempted first degree murder, the court imposed a consecutive term comprised of the seven-year-to-life midterm for attempted murder and an additional mandatory 25 years to life for a firearm enhancement (§§ 664, subd. (a), 12022.53, subd. (d)). The court also imposed a concurrent three-year term for count 10, carrying a loaded firearm. Sentence on the remaining counts and enhancements was stayed. The total term was 82 years to life.

II. DISCUSSION

A. Lack of Instruction on Voluntary Manslaughter

Defendant contends the trial court erred in failing to instruct the jury on voluntary manslaughter and attempted voluntary manslaughter as lesser included offenses of murder and attempted murder. We review this question independently. (*People v. Waidla* (2000) 22 Cal.4th 690, 739.)

" 'In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citation.] This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. [Citation.] The trial court must so instruct even when, as a matter of trial tactics, a defendant not only fails to request the instruction, but expressly objects to its being given.' " (*People v. Moye* (2009)

[5] All statutory references are to the Penal Code.

47 Cal.4th 537, 548.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).)

" 'Murder is the unlawful killing of a human being . . . with malice aforethought.' (§ 187, subd. (a).) When a person kills while acting 'upon a sudden quarrel or heat of passion' (§ 192, subd. (a))—even if exercising a sufficient 'measure of thought . . . to form . . . an intent to kill'—he or she acts with 'a mental state that precludes the formation of malice' [citation]. Thus, the offense of murder is reduced to the lesser included offense of voluntary manslaughter when the defendant acted upon a sudden quarrel or in the heat of passion. [Citation.] A person acts upon a sudden quarrel or in the heat of passion if he or she 'acts without reflection in response to adequate provocation.' [Citation.] Provocation is legally adequate if it ' " 'would cause the ordinarily reasonable person of average disposition to act rashly and . . . from . . . passion rather than from judgment.' " ' " (*People v. Peau* (2015) 236 Cal.App.4th 823, 829–830.) "While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice." (*People v. Beltran* (2013) 56 Cal.4th 935, 942 *(Beltran)*.) The passion aroused "need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citation] other than revenge." (*Breverman, supra,* 19 Cal.4th at p. 163.) The inquiry is not whether the provocation is of the kind that would cause an ordinary person of average disposition to *kill,* but whether it would cause such a person to react from passion rather than from judgment. (*Beltran,* at pp. 938–939, 949.)

Defendant argues that evidence of legally sufficient provocation is found in the testimony that the car Danisha was driving suddenly approached defendant, revved its engine, and flashed its lights; or, alternatively, in Marshella's testimony that she thought the shooter was in the vehicle that Danisha's car hit.

The Attorney General urges us not to consider this issue because defendant invited any error by expressly objecting at trial to the inclusion of manslaughter instructions as a tactical matter. After trial, defendant moved for a new trial in part on the ground that the court had a duty to instruct on voluntary manslaughter and attempted voluntary manslaughter. At the hearing on the motion, the trial court explained that defendant's trial counsel had objected strenuously to the inclusion of manslaughter instructions because there was no evidence to support a manslaughter instruction and she wanted an "all or nothing proposition."

Despite this exchange, we will not treat the point as waived. It is true that appellate courts have refused to allow a defendant to "invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence." (*People v. Barton* (1995) 12 Cal.4th 186, 198, and cases cited therein; accord, *People v. Hardy* (2018) 5 Cal.5th 56, 98–99 (*Hardy*).) But here, the discussion of jury instructions between the court and counsel during trial took place *off the record*, so we have no transcript of defense counsel's objection to voluntary manslaughter instructions. Moreover, the hearing on the new trial motion took place ten months after the original discussion, and defendant was represented not by his trial counsel but by a new attorney who lacked first-hand knowledge of the matter and was not in a position to correct any misunderstanding. In the circumstances, we will decide this issue on the merits.

The Attorney General argues that there is no evidence defendant acted under a strong passion and, in any case, the provocation he claims—either being approached suddenly by a car with flashing lights and a revved engine, or being the victim of a collision, followed by a heated verbal exchange—is legally inadequate to reduce murder to manslaughter or attempted murder to attempted manslaughter. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 826 ["a voluntary manslaughter instruction is not warranted where the act that allegedly provoked the killing was no more than taunting words, a technical battery, or slight touching"].) We agree with the Attorney General.

People v. Oropeza (2007) 151 Cal.App.4th 73, is instructive. As the defendant there rode as a passenger in a truck, another vehicle intentionally cut it off in traffic, and an exchange of yelling and offensive hand gestures ensued. (*Id.* at p. 76.) The defendant fired a handgun at the vehicle, killing a passenger. (*Ibid*.) The appellate court rejected the defendant's contention that the jury should have been instructed on voluntary manslaughter. The court noted, that, "[b]ecause the test of sufficient provocation is an objective one based on a reasonable person standard, the fact the defendant is intoxicated or suffers from a mental abnormality or has particular susceptibilities to events is irrelevant in determining whether the claimed provocation was sufficient." (*Id.* at p. 83.) The court went on to conclude that, while an "ordinarily reasonable person" might be angered by being cut off in traffic, such a person would not pursue the vehicle or engage in aggressive driving and abusive personal behavior, and that "[w]hile appellant showed an abundance of human weakness, it was not of a type such that the law is willing to declare his acts less culpable." (*Ibid*.; see *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1225–1226 [victim making U-turn and alighting unarmed from truck was not provocation that would cause ordinary person to act rashly]; see also *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1415 [heat of passion instruction properly refused where defendant's actions did "not constitute conduct by a reasonable person of average disposition," but rather "the actions of an obsessed stalker"].) Similarly here, the victims' actions in driving toward defendant in a parking lot or having a minor collision with a car defendant was driving did not constitute the type of provocation that would cause an ordinary person of average disposition to act rashly. No instruction on voluntary manslaughter or attempted voluntary manslaughter was necessary.

B. Ineffective Assistance of Counsel

1. Legal Standards

"Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability'

that, but for counsel's failings, defendant would have obtained a more favorable result." (*People v. Dennis* (1998) 17 Cal.4th 468, 540 (*Dennis*).) "A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance." (*Id*. at p. 541.) Tactical errors are generally not reversible. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1318.) On review, this court will defer to the trial court's factual findings where they are supported by substantial evidence, but will independently assess whether, with the facts so found, defendant was deprived of the effective assistance of counsel. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724–725 *(Taylor)*.)

If a defendant does not show that the actions of counsel were prejudicial, we may reject the claim without considering whether counsel's performance was deficient. (*People v. Mayfield* (1997) 14 Cal.4th 668, 784 (*Mayfield*).) Prejudice is established when counsel's performance " 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*Ibid*., quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686.) Prejudice must be proved as a " 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937 (*Williams*).)

2. Effect of Provocation on Degree of Murder

Defendant contends his counsel was ineffective in failing to ask the court to instruct the jury regarding the effect of provocation on the degree of murder. CALCRIM No. 522 provides in pertinent part: "Provocation may reduce a murder from first degree to second degree. . . . [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." As defendant recognizes, instructions on provocation are "pinpoint instructions" that need not be given sua sponte. (*Hardy*, *supra*, 5 Cal.5th at p. 99; *People v. Rogers* (2006) 39 Cal.4th 826, 878.)

After trial, defendant moved for a new trial, in part on the ground of ineffective assistance of counsel. In a supportive declaration, his trial counsel stated, "Although the defense at trial was misidentification, I did not have a strategic reason for not requesting

[CALCRIM No. 522]. The jury was being instructed with second degree and attempted second degree murder and I had no reason for not having the jury consider provocation in deciding the degree of murder in the event the jury rejected the misidentification defense." The trial court expressed skepticism, stating that trial counsel "was very thoughtful in terms of what we were doing. She seemed very clear to the Court on and off the record about what her tactics were. And so these issues that you raise . . . kind of belie her declaration because it's different than certainly the impression she gave or the things she said during the course of the trial and particularly as we entered into the final stages about what her—what their theory of the case was, and I would presume that that was with Mr. Green's consent." The court denied the new trial motion.

When a trial court denies a motion for a new trial claiming ineffective assistance of counsel, we uphold the trial court's factual findings if they are supported by substantial evidence and we exercise our independent judgment on questions of law. (*Taylor, supra*, 162 Cal.App.3d at 724–725.) "Where, as here, defendant is represented by different counsel at the motion for a new trial and the issue is called to the trial court's attention, the trial judge's decision is especially entitled to great weight and we defer to [her] fact finding power." (*People v. Wallin* (1981) 124 Cal.App.3d 479, 483.)

Even assuming trial counsel had no strategic purpose in omitting to request an instruction on the effect of provocation on the degree of murder, we find no grounds to reverse the judgment on this basis. The theory of the defense was not that defendant acted without deliberation, but that he did not shoot the victims. In her closing argument, defense counsel took the position that defendant was outside the victims' car with Funaki and it was someone else who emerged from the black Chrysler and shot the young women. She acknowledged that the shooter's conduct was unjustified and it was "ridiculous" for a fender bender to turn into a shooting. Thus, provocation was inconsistent with defendant's theory of the case. An effort to argue that Warren and Danisha provoked the shooter could well have damaged counsel's credibility as she tried to persuade the jury to accept her version of events. Counsel did not fall below an

objective standard of reasonable representation in failing to request an instruction on provocation. (See *Dennis, supra,* 17 Cal.4th at p. 540.)

Nor do we see a reasonable probability the jury would have reached a different conclusion if it had been instructed on provocation. As we have already discussed, the evidence of provocation was weak at best. The instruction regarding first degree murder informed the jury that "[a] decision to kill made rashly, impulsively or without careful consideration is not deliberate and premeditated." This instruction gave the jury the opportunity to consider whether the victims' words and actions caused defendant to act rashly or impulsively when it considered the degree of murder. (See *Hardy, supra,* 5 Cal.5th at p. 99 [no error in failing to instruct on provocation where instructions informed jury that deliberation necessary for first degree murder was inconsistent with intent formed under sudden heat of passion or other condition precluding deliberation].) Defendant has failed to show prejudice as a " 'demonstrable reality.' " (*Williams, supra,* 44 Cal.3d at p. 937.)

3. Limiting Instruction Regarding Witnesses' Fear

Defendant contends his counsel rendered ineffective assistance by failing to request a limiting instruction informing the jury that evidence that some of the witnesses were afraid to testify should be considered only to evaluate their credibility.

a. Background

Some of the prosecution witnesses gave testimony that differed from previous statements they had made, and there was evidence they were fearful: The security guard identified the person on the surveillance video as the shooter after the incident, but at trial he testified he only meant the person looked like the shooter. He had told a police inspector shortly before trial that he had concerns about his family if he testified in the case and that "people" told him he should have nothing to do with the case; but at trial he denied being afraid to testify.

Haunani told police after the shooting that she knew defendant and was sure he was the shooter, and she described his appearance. She said she was scared and wished to remain anonymous. At trial she denied knowing defendant or recalling what he was

wearing, and she testified she did not recall recognizing him or describing him to the police.

Manufou identified a picture of defendant as the shooter after the incident, but testified at trial that she could not recall whether she saw the shooter. In an interview with the police inspector, she had said she did not want to be involved in the case because the Polynesian community was small, people in the community were upset about it, the crimes made the community look bad, and she did not want her name associated with the case. At trial, she testified she recalled being interviewed by a police inspector, but denied recalling the details of the interview and denied having positively identified a picture of the shooter. She testified that she was not comfortable testifying in a murder case, but said no one had threatened or harassed her in any way, and that she had never seen or met defendant before.

Funaki, who was with defendant at the time of the shootings, professed no knowledge of the shooter's identity. She testified she was afraid to talk to the police after the crimes because people who lived around her knew who the shooter was. She spoke to the police after a woman beat her up and told her to stop talking "shit" about "Mikes." Funaki later found out the woman was the mother of defendant's child. Funaki testified she was "a little bit" concerned about testifying and afraid she would be beaten up again.

In her closing argument, the prosecutor argued that Haunani, Manufou, and the security guard had changed their story to help the defense because they were afraid.

b. Analysis

" 'Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible,' " even if there is no evidence the defendant personally threatened the witness or the fear is retaliation is " ' "directly linked" to the defendant.' " (*People v. McKinnon* (2011) 52 Cal.4th 610, 668.) In *McKinnon*, our high court concluded admission of such evidence was not unduly prejudicial where the court instructed the jury that evidence of an assault by the defendant's brother was introduced as it bore on the witness's state of mind and

demeanor while testifying and that there was no evidence the defendant assisted or played any role in the assault. (*Id.* at pp. 668, 670.)

Defendant contends his counsel was ineffective in not requesting a similar limiting instruction regarding the witness's fear. His trial counsel's declaration in support of defendant's motion for a new trial stated that she objected to the testimony that witnesses were afraid to testify, that she was afraid the jury would infer that defendant was responsible for the witnesses' fear, that she should have requested a limiting instruction, and that she had no strategic reason for not requesting one.

We need not consider whether defense counsel's performance was deficient because we conclude defendant has not met his burden to show prejudice. (*Mayfield, supra,* 14 Cal.4th at p. 784.) Defendant argues that, in the absence of an instruction informing the jury the evidence was relevant only to the witnesses' credibility, the jury was likely to infer that he was responsible for the witness's fear (since he was the defendant and came from the same community as some of the witnesses) and would believe he was conscious of guilt and prone to violence. Any such inference would be speculative. There was no evidence defendant had threatened the witnesses who changed their stories or that he was responsible for their fear, so we see no reason to conclude the jury would have improperly leapt to that conclusion. While the prosecutor pointed out in her closing argument that some of the witnesses were afraid, she did not argue that defendant had threatened them. Moreover, multiple other witnesses independently identified defendant as the shooter. We see no reasonable probability that defendant would have achieved a more favorable result if the jury had been given a limiting instruction.

C. Evidence of Premeditation and Deliberation

Defendant contends there is insufficient evidence that the murder and attempted murder were of the first degree. When considering such a challenge, we review the record in the light most favorable to the judgment to determine whether it contains substantial evidence that would allow a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*Mayfield, supra,* 14 Cal.4th at p. 767.)

" 'A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. (§ 189 ["willful, deliberate and premeditated killing" as first degree murder].) "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' " ' [Citation.] In *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*), '[our high court] "identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing." [Citation.] "However, these factors are not exclusive, nor are they invariably determinative." [Citation.] " '*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as a result of preexisting reflection rather than unconsidered or rash impulse.' " ' " (*People v. Cage* (2015) 62 Cal.4th 256, 275–276.)

Although the incident unfolded rapidly, we conclude the evidence supports the jury's verdict. A motive for defendant's action—albeit a weak one—is found in the evidence that defendant was annoyed when the victims' car approached and shone its headlights on him, and that the victims' car then hit a vehicle associated with his group of friends.

There is also evidence to support an inference that defendant deliberated and planned his actions, however briefly. He walked slowly toward the vehicles as Funaki told him to "leave it alone." The two groups exchanged words, and defendant either got a gun from the purse of one of his friends or retrieved one from the black vehicle. He cocked the gun, pointed it at Warren and the friends who had joined her at the back of the car, and asked the women if they had a problem. Franchesca said, "No. We just came out here to have a good time. It's not that serious. Danisha has insurance," and he continued pointing the gun at them. He then pointed it at Danisha; when Warren told him to wait, he shot Warren, then turned to the victims' car to shoot Danisha multiple times.

The jury could reasonably conclude defendant had time during this series of events to deliberate and that he in fact did so.

Finally, the manner of killing Warren, with a shot to her face, supports an inference of planning. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1071 [" 'a close-range gunshot to the face is arguably sufficiently "particular and exacting" to permit an inference that defendant was acting according to a preconceived design' "].) Viewing the evidence in the light most favorable to the verdict, as we must, we reject defendant's challenge to his convictions of first degree murder and attempted first degree murder.

D. Firearm Enhancement

With respect to both murder and attempted murder, the jury found true allegations that defendant personally and intentionally discharged a firearm, causing great bodily injury or death (§ 12022.53, subd. (d)), as well as firearm enhancements under section 12022.53, subdivisions (b) and (c). At the time defendant was sentenced, the subdivision (d) enhancements carried mandatory terms of 25 years to life. (Former § 12022.53, subd. (h).) The trial court imposed consecutive sentences for murder and attempted murder, each of which carried the 25-year enhancement under section 12022.53, subdivision (d), and stayed the remaining of the enhancements. Subsequently, the Legislature amended section 12022.53 to give trial courts discretion to strike or dismiss enhancements otherwise required to be imposed by that statute. (§ 12022.53, subd. (h), as amended by Stats. 2017, § 2.)

Defendant contends that this amendment should be applied retroactively and that the matter should be remanded for the trial court to consider whether, in the exercise of its discretion, it should dismiss or strike the firearm enhancements. The Attorney General concedes the amendments to section 12022.53 apply retroactively to cases not yet final on appeal. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424–428 (*McDaniels*); *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506–507.)

The Attorney General argues, however, that remand is unnecessary because the record makes clear the trial court would not strike the gun use enhancements. The court in *McDaniels* explained that when a trial court has expressed the intent to impose the

maximum sentence permitted, "a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in the defendant's favor." (*McDaniels, supra*, 22 Cal.App.5th at p. 427.) The court noted that, given the high stakes of firearm enhancements, "it seems to us that a reviewing court has all the more reason to allow the trial court to decide in the first instance whether these enhancements should be stricken . . . ." (*Ibid.*)

Remand is proper here. In rejecting defendant's request that the sentences for murder and attempted murder run concurrently, the trial court emphasized that as a second victim, Danisha was "entitled to equal justice." Although it imposed a substantial sentence on defendant, it did not express an intent to impose the maximum sentence possible; in fact, at the People's request, it imposed a concurrent rather than consecutive sentence for count 10, carrying a loaded firearm, after initially indicating it would impose a consecutive sentence. In the circumstances, we cannot be confident the court would not have stricken one or both of the section 12022.53, subdivision (d) firearm enhancements. It is appropriate to allow the trial court to make that decision in the first instance.

III. DISPOSITION

The matter is remanded to the trial court to conduct a resentencing hearing at which it will consider whether to strike any of the firearm enhancements found true under section 12022.53. In all other respects, the judgment is affirmed.

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TUCHER, J.

WE CONCUR:

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POLLAK, P. J.

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BROWN, J.